

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEVIN WHITTIER,

Plaintiff,

v.

SEATTLE TUNNEL PARTNERS, *et al.*,

Defendants.

NO. C17-0751RSL

ORDER DENYING MOTION FOR
SUMMARY JUDGMENT
REGARDING REBAR
PROTECTION

This matter comes before the Court on “Defendant Seattle Tunnel Partners’ Motion for Partial Summary Judgment re: Rebar Protection” (Dkt. # 96) and Harris Rebar Seattle, Inc.’s joinder therein (Dkt. # 102). Plaintiff was injured when a rebar wall he was building as part of the SR-99 tunnel project collapsed. He alleges that Seattle Tunnel Partners (“STP”) and Harris Rebar Seattle, as the general contractor and the rebar subcontractor respectively, were negligent when they failed to ensure that all vertically protruding pieces of rebar were protected or capped in a way that would prevent impalement of workers working above the exposed metal dowels. Defendants seek dismissal of the negligence claim regarding rebar protection, arguing that there is no competent evidence that the alleged breach was causally connected to any of plaintiff’s injuries. For purposes of this motion, defendants are not disputing that they owed and breached a

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1 duty to provide adequate rebar protection at the job site.

2 Summary judgment is appropriate when, viewing the facts in the light most favorable to
3 the nonmoving party, there is no genuine issue of material fact that would preclude the entry of
4 judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial
5 responsibility of informing the district court of the basis for its motion” (Celotex Corp. v.
6 Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that
7 show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving
8 party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to
9 designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S.
10 at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . .
11 and draw all reasonable inferences in that party’s favor.” Krechman v. County of Riverside, 723
12 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury genuine issues
13 regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence
14 of a scintilla of evidence in support of the non-moving party’s position will be insufficient” to
15 avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014);
16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution
17 would not affect the outcome of the suit are irrelevant to the consideration of a motion for
18 summary judgment. S. Cal. Darts Ass’n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other
19 words, summary judgment should be granted where the nonmoving party fails to offer evidence
20 from which a reasonable jury could return a verdict in its favor. FreecycleSunnyvale v. Freecycle
21 Network, 626 F.3d 509, 514 (9th Cir. 2010).

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1 Having reviewed the memoranda, declarations, and exhibits submitted by the parties¹ and
2 taking the evidence in the light most favorable to plaintiff, the Court finds as follows:

3 BACKGROUND

4 On the morning of February 12, 2015, plaintiff, an apprentice ironworker, and his crew
5 arrived at their scheduled worksite - an area in the north end of the tunnel project that was to
6 become an elevator shaft - only to find that none of the vertical rebar over which the crew would
7 be working had been capped. Plaintiff's foreman confirmed with an STP manager that STP
8 would cover the exposed ends. When it did not happen, the crew took it upon themselves to cap
9 the dowels: they scrounged rebar caps from the area and, when they ran out of caps, tied 2x4s to
10 the sides of the vertical rebar as close to the top as they could get it. Although the industry
11 standard would involve putting another 2x4 on top of the rebar ends to effectively cap them,
12 plaintiff and his foreman thought the dowel protection they had installed was sufficient.
13 Photographs of the accident site show rebar extending above the top edges of the 2x4s.

14 The crew began work building the rebar wall. Plaintiff's job was to reach down and grab
15 the next piece of rebar as it was handed up from below. As the wall got taller, plaintiff noticed
16 that it would sway when he leaned back to reach for the rebar. When the wall was between 25-
17 28 feet high, a lag screw inserted into the wood lining of the elevator shaft pulled out, causing a
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22 ¹ For purposes of this motion, the Court has considered Mr. Lawless' declaration regarding
23 construction safety standards and practices (particularly his opinions regarding the industry standard for
24 impalement protection), but has not considered his testimony regarding plaintiff's medical injuries or the
25 cause thereof. Dr. Seroussi's declaration is considered only for the facts regarding the nature and extent
26 of plaintiff's left elbow injury and that those injuries were consistent with impacting an exposed piece of
27 rebar, not that plaintiff fell onto exposed rebar. Finally, the Court has considered Mr. Hayes' opinions to
28 the extent they touch on accident reconstruction and injury biomechanics: industry standards, medical
causation, and medical record interpretation do not appear to be within his areas of expertise.

1 chain reaction and wall collapse. Plaintiff was the first to hit the end of his safety line and,
2 unfortunately, landed on top of an area of vertical rebar rather than being pulled up short in the
3 air. Plaintiff landed on his back, breaking one of the 2x4s tied to the side of the rebar. His hard
4 hat exploded into pieces and his left elbow and back were impaled by vertical dowel ends.

6 DISCUSSION

7 A. Cause in Fact

8 Defendants argue that their failure to ensure that all vertically protruding pieces of rebar
9 were appropriately protected or capped was not the cause in fact of plaintiff's injuries. "Cause in
10 fact refers to the actual, but for, cause of the injury, *i.e.*, but for the defendant's actions the
11 plaintiff would not be injured. Establishing cause in fact involves the determination of what
12 actually occurred and is generally left to the jury." Schooley v. Pinch's Deli Market, Inc., 134
13 Wn.2d 468, 478 (1998) (internal quotation marks and citation omitted).

15 Taking the evidence in the light most favorable to plaintiff, a reasonable jury could find
16 that, but for defendants' failure to properly cap the vertical pieces of metal in the area below
17 where plaintiff was working, he would not have suffered impalement injuries. The sequence of
18 events from defendants failing to cap the rebar - or to ensure that it was appropriately capped - to
19 plaintiff's impalement injuries is direct and unbroken. See Taggart v. State, 118 Wn.2d 195, 226
20 (1992). Defendants' insistence that the collapsing wall was the "but for" cause of plaintiff's fall
21 and resulting injuries misses the point.² While the collapse of the wall was undoubtedly a "but
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24 ² At various points in its motion, defendants also assert that their failure to provide adequate
25 dowel protection did not cause the "incident," *i.e.*, the wall to collapse. See Dkt. # 96 at 13; Dkt. # 102
26 at 1. That assertion, too, misses the mark. The issue is whether STP's alleged breach of duty was the
"but for" cause of plaintiff's injuries, not of any particular event in the causal chain.

1 for” cause of plaintiff’s injuries, “there may be more than one cause in fact.” Michaels v. CH2M
2 Hill, Inc., 171 Wn.2d 587, 610 (2011). See Joyce v. Dep’t of Corr., 155 Wn.2d 306, 322 (2005)
3 (upholding jury determination that defendant’s failure to adequately supervise an offender was
4 the but for cause of plaintiff’s decedent’s death, where other “but for” causes in the sequence of
5 events included the offender stealing a car, running a red light, and colliding with the decedent’s
6 vehicle).

8 Defendants also argue that plaintiff’s efforts to cap the exposed rebar broke the causal
9 chain between their breach of duty and plaintiff’s injuries. However, there is evidence in the
10 record from which one could conclude that plaintiff’s attempts to create a safe work space for
11 himself and his crew did not satisfy industry standards. The defects in plaintiff’s efforts may
12 have been caused by a lack of adequate materials or a lack of awareness that stringing 2x4s
13 along the side of vertically exposed rebar did not provide adequate protection. Regardless, it was
14 defendants’ duty to ensure a safe work space, and the failure to do so is not excused simply
15 because someone else attempted - and failed - to provide adequate rebar protection. This is not a
16 situation where plaintiff wholly satisfied defendants’ duty, and the injuries nevertheless
17 occurred. Nor is there any evidence that plaintiff’s actions made the workplace more dangerous
18 in some relevant way. Defendants have not shown that, as a matter of law, plaintiff’s attempts to
19 make sure his work environment was safe broke the causal chain between their failure to provide
20 rebar protection and plaintiff’s injuries.

23 **B. Legal Cause**

24 With regards to legal causation, defendants argue that any breach of duty on their part
25 was simply “too remote or insubstantial to establish legal cause and impose liability.” Dkt. # 96
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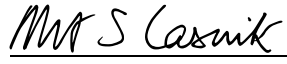
1 at 14. See Schooley, 134 Wn.2d at 478-79. Legal causation is determined by the court and
2 depends on considerations of “logic, common sense, justice, policy, and precedent.” Id. “The
3 analysis of whether a duty is owed and legal causation exists are intertwined. Whether liability
4 should attach is essentially another aspect of the policy decision which we confronted in
5 deciding whether the duty exists.” Michaels, 171 Wn.2d at 612 (internal alterations, quotation
6 marks, and citations omitted).

8 Washington law expressly imposes upon contractors the duty to ensure a safe workplace
9 as the best means of protecting workers from injury. See Kamla v. Space Needle Corp., 147
10 Wn.2d 114, 124 (2002) (“Because a general contractor is in the best position, financially and
11 structurally, to ensure WISHA compliance or provide safety equipment to workers, we place
12 ‘the prime responsibility for safety of all workers . . . on the general contractor.’”) (ellipses in
13 original) (quoting Stute v P.B.M.C. Inc., 114 Wn.2d 454, 463 (1990)). The policy and logic
14 supporting the imposition of that duty also supports the imposition of liability here. If plaintiff
15 proves that, as a result of defendants’ breach of the duty to provide a safe workplace, he ended
16 up working above exposed metal dowels, the breach would not be insubstantial. Nor would the
17 possibility of a workplace mishap and/or the nature of the harm plaintiff ultimately suffered be
18 unforeseeable or remote. In fact, it is exactly this type of impalement injury following a fall that
19 Washington is trying to avoid by imposing a duty to provide rebar protection in the first place.
20 Defendants are not entitled to judgment as a matter of law on their legal causation argument.
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1 For all of the foregoing reasons, defendants' motion for summary judgment regarding
2 rebar protection (Dkt. # 96) is DENIED.

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4 Dated this 18th day of June, 2019.

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7 Robert S. Lasnik
8 United States District Judge
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